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LAW ENFORCEMENT—AN ATTEMPT AT SOCIAL DISSECTION

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I

COURTS are never able to live up to the standards set for them by legal scholars. We know that the standards of certainty for legal statement, set by the traditional legal scholar, will never be fulfilled. We also know that the requirement of universal understanding of the diverse problems confronting courts, insisted upon by the realist, is equally impossible. Yet it seems to be the general opinion that we should keep on criticising courts in the light of these unattainable ideals. If the frailty of human nature and the ingenuity of the trial lawyer or politician prevent our ever reaching them, that is no reason why scholars should give up the struggle. To the scholar belongs the evangelical task of making judicial conduct conform to judicial ideals by preaching and by formulating these ideals. To the trial lawyer and politician is left the practical task of twisting these ideals to conform to judicial conduct. Thus the scholars rule supreme in the law schools, only faintly annoyed by the politicians. The politicians and practical lawyers operate the courts, avoiding direct opposition to scholarly ideals without much difficulty. Two possible explanations why scholars are ineffective in controlling courts suggest themselves: (1) the standards by which scholars judge courts may be wrong; (2) their criticism and reforms may be misdirected. We shall examine these possibilities in connection with one of the most unattainable, yet most persistent of these ideals—the ideal of Law Enforcement.¹

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1. This paper was prepared in connection with a seminar on the Judicial Process from the point of view of Social Psychology, given by the writer and Edward S. Robinson, Professor of Psychology, Yale University. The writer acknowledges his indebtedness to Professor Robinson for suggestions and criticism.

It is interesting to present by way of analogy an attitude on the part of medical scholars which delayed the discovery of the circulation of the blood until the beginning of the 17th century.² Galen formulated his fundamental principles of anatomy before human dissection had become respectable. When dissection began, the ideal structure, in which each supposed organ of the human body had its divine purpose, had already been formulated, and no one dreamed of questioning its basic principles (except perhaps a few dissenters who had another set of principles). The method of study is illustrated by an old print of a lecture on anatomy at Padua in the fifteenth century. We see the master, seated on a sort of throne at some distance from the cadaver, lecturing on Galen's text. Below, a robed assistant with a pointer indicates those portions of the human body which are relevant to the lecture. The actual dissection is being done by a menial who is not permitted to wear the robes of learning. Students stand around, but do not dissect. It is not surprising that such methods always proved the text of Galen, an anatomy composed of the jumbled portions of all sorts of animals. Differences could be explained by pointing out that the human constitution had degenerated since the days of the constitutional fathers, or else that they were those inevitable minor details and border line cases which always conflict with any body of learning. Generally, however, differences would not be noticed. Anatomy was a learned pursuit and therefore, true to its type, it had to ignore or else to explain away as immaterial, matters which created disorder in its organized ideas. It seems to be the eternal paradox of the human mind that principles and faiths which are so essential to its comfort, and to the orderly organization of ideas in such a manner that they can be transmitted, should at the same time always stand as the greatest obstacle to discovery.

It is not difficult to make a comparison between this ancient print and the methods of social and legal studies of our own day. It is as applicable to the realist who thinks rules are unimportant as to the fundamentalist who accepts them. Both ignore the structure of the institution before them except as it illustrates their theories. The dissection of social phenomena such as the election of Ma Ferguson in Texas, the power of John McCooey in Brooklyn, and the bonus army in Washington are beyond their sphere, except in so far as it becomes necessary to point out that they are all bad things, which deserve no sympathy or tolerance. They are thought of as examples

2. The medical analogies used in this paper are taken from an unpublished manuscript prepared by Professor Walton Hamilton of the Yale School of Law for the Josiah May Foundation.

of social decay which can be cured by educating the people in the dangers of demagogues, the evils of politics and the folly of communistic ideas.

The legal scholar, compelled to study only one institution, the Courts, does resort to dissecting methods, but his dissection is that of the followers of Galen, designed to illustrate and prove various ideal legal anatomies. The bar and courts in general are shown to be what they are supposed to be. Departure in intelligence or conduct from the ideal is always caused by degeneration typified by the shyster, the politician, or the ignoramus. If the speeches before bar associations are wordy and platitudinous, the scholar insists on looking forward to the better educated bar of tomorrow. If *Corpus Juris* is too often cited by courts in place of more careful legal effusions, we resolve either to wean the lawyers away from it by the American Law Institute, or to push them in a different direction by showing the hollowness of all legal formulae. What we are most concerned with is not the imperfections of the present but the probable effect of better ideas on the better judges who will appear when politics is finally taken out of politics. The content of present popularly conceived legal and social ideas, good, bad and indifferent, and their effect upon governmental institutions—the way they give life to and mould the growth of the bench and bar as we now have them, are seldom considered.

This is of course to be expected, and it is neither to be deplored nor applauded. It is simply one of the phenomena of human organization. The preaching technique, perhaps one of the most powerful of social factors, is always the first to be mastered, possibly because it is the most essential to an orderly society (or possibly because it is the easiest). Poetry always appears before science, and certainly no one would claim that it is an unworthy occupation for legal scholars. Nor is the fact that preaching must always contend against the disorganizing influence of new ideas and new methods to be considered other than as one of the objective phenomena incident to all human organization. This fact is an integral part of the anatomy of any institution, and to deprecate it is like deploring the handicap which childbearing puts on women. Preachers who preach against preaching are still preachers.

If we are to escape from Galen's anatomy in one form or another, we must consider institutions and the mass psychology surrounding them as living organisms, not dissimilar to human personalities, moulded by habit, shaken by emotional conflicts, turned this way and that by words, constantly making good resolutions which affect them but not in the way that the terminology of the resolutions might indicate, and never quite understanding themselves or the

part they are actually playing because of the necessary illusions with which they must surround themselves to preserve their prestige and self respect. This attitude is not common to either the law or the social sciences, yet it must be the attitude of one who is making an objective dissection.

We may illustrate by pointing out that John McCooey has a certain verbal or emotional magic by which he is able to exercise an astonishing control over the city of Brooklyn. It is difficult to say that he does not have a very penetrating knowledge, or at least a successful technique which should concern the science of government. However, his admission to the faculty of any respectable hall of learning is unthinkable; his information fits into no established classification. It is unorganized. He has no "field." Clarence Darrow appears not to believe in any legal principles, yet few are more successful in their chosen type of cases in getting results with the legal principles which he so distrusts. Yet persons like Clarence Darrow are not seriously regarded as legal scholars because their variegated experience with the legal system has prevented them from having the time or perhaps even the inclination to make any close and careful study of the law. What trial lawyers know is unorganized and therefore unteachable. Further than that, it is better not to organize it because of the confusion into which such organization would throw present legal thought. That such techniques are kept out of organized learning as long as possible is certainly something the social anatomist should expect as a matter of course and recognize without any particular feeling of indignation. However, they have a tendency to break the barriers when some accident gives them a chance.

We may illustrate with another medical analogy. At the time of Louis XIV some of the most important discoveries and most useful medical techniques, the most important of which was surgery, were the property of the barber surgeons of the day,—a group who were related to the physicians in much the same way that the Tammany politician is related to the statesman and to the scholar in Government today. Not only was their social standing none too good, but their approach and ideas were upsetting to the logical structure approved by the University of Paris and adopted by all right thinking doctors. It was also unorganized and therefore unteachable. Louis XIV had the misfortune to develop an uncomfortable carbuncle which required an operation. Obviously no commoner could touch the divine person of his majesty, so a barber surgeon had to be elevated to the nobility. An epidemic of boils on the persons of the nobility followed. More barber surgeons were elevated. The physicians held a parade in protest, but it was too late. The technique

of surgery was already on its way to respectability. Knowledge of surgery was soon to be indispensable to the physician.

Today there unquestionably exist developed techniques in the operation of governmental institutions which are never admitted to the realm of the student of government because the people who practice them are not respectable, or because their inclusion would disorganize an ancient ideology. The only realistic test of a political speech is its vote-getting effect. This is recognized by the tradesmen of politics but denied by political scholars and highminded persons generally. Such persons judge political utterances by standards of sincerity and economic analysis. The idea of using words and prejudices as tools to push people into desired courses of conduct without any particular anxiety as to the absolute truth of these ideas or prejudices, is one of those "bad things" which a sufficient amount of preaching is supposed to cure. The preconceived or ideal anatomy of society is constantly substituted for the real. Appeals to emotional impulses are not looked upon impersonally as forces which, regardless of their truth, mould institutions in various ways. Instead, we adopt the ancient medical assumption that society is possessed of a devil, who must be driven out with incantations. The net result is, not that political speeches become more sincere, but that scholars are notable failures in understanding political institutions.

When we turn to legal institutions we find the same situation. Ideas are pursued for their own sake, not examined to determine their force or effect in the sphere within which they operate. Legal principles are discussed as things which govern a society which has never studied them, or else as meaningless ritual which has no effect, even upon the Courts which use them. A word like "estoppel", or "trust", the utterance of which in properly solemn tones at the right moment may cause a court to step aside suddenly and let some established doctrine go whizzing harmlessly by, is treated as if it must be made to have some definite meaning or else dropped. The writer recalls the emphasis with which a great law teacher used to say, "The loose use of the term estoppel is an infallible sign of a weak intellect." On the other hand, if the discovery is made that no legal formulae can long retain any definite meaning, the assumption is that their pronouncement should not affect judicial conduct, and therefore something else should be substituted. The failure of the New York code to get rid of the distinction between law and equity is treated either as showing that these legal distinctions are fundamental to correct thought, or else as a proof of judicial stupidity, instead of as an example of reformers' lack of understanding of the mass psychology of the judicial institution from which not even judges can escape. The distinction between Courts, bureaus,

and commissions becomes a matter of elaborate definition, instead of a recognition of the fact that the differences between a judge sitting as a court, and one sitting as a bureau is simply the difference of our attitude toward him, reflected in his attitude toward himself. Finally the failure of our definitional schemes to work is generally laid to the lack of those "better judges" who will finally appear when unfit but astute politicians are unable to obtain lucrative offices.

May we not subject a judicial institution to something resembling the process of dissection in order to find out the stimuli to which it responds, without judgments as to whether those stimuli are moral or sincere according to the precepts of some preconceived social anatomy? Perhaps in this way we might learn why so many high-minded schemes fail and so many low-minded schemes succeed, without recourse to the naive idea that the institution is possessed of a devil which can be exorted away.

II

The above is a somewhat elaborate introduction to an inquiry concerning the nature and effect of the vague abstraction of Law Enforcement as it has penetrated the public consciousness and moulded the administration of the criminal law. Yet it seemed necessary in order to remove an atmosphere of cynicism from the discussion which follows. Law Enforcement represents a reverently held ideal which has had its value in inducing a feeling that criminal justice is both impartial and impersonal—that principles instead of personal discretion control the actions of judges and prosecutors. To this feeling courts have owed part of their prestige and public acceptance of their sometimes unpopular acts. Therefore, to subject this ideal to objective examination is to appear both disrespectful and destructive. It is hard at first to understand and at the same time to cherish an illusion.

Yet even the ordinary human mind is quite capable of recognizing both that an ideal has no objective truth and yet that it does have emotional value. For example, note the display of joy and sadness at football games indulged in by alumni who well know that nothing of importance is at stake; note the necessity of the presence of an admittedly non-existent Santa Claus at Christmas; note the English attitude toward their king. Most churches today have achieved that attitude toward their creeds. Realistic understanding of an ideal does not *necessarily* destroy it. In the end it may make the ideal even more vital by restricting it to the purposes for which it has value.

The creed of Law Enforcement has recently been stated by a high public official as follows:

"The most malign of all these dangers [to the state] today is disregard and disobedience of law Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some laws is that it destroys respect for all law If citizens do not like a law their duty as honest men and women is to discourage its violation; their right is to work openly for its repeal."

The idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy. The fact that prosecuting attorneys are compelled to do this very thing is generally ignored, or when attention is called to it, regarded as evidence of some kind of social degeneration which must be preached away in public speech and judicial utterance. Nor does the fact that the actual conduct of the ordinary citizen constantly contradicts this ideal seem to weaken public faith in it. Politicians may drink in private, but they must come out for law enforcement in public. Disorder must be curbed by law enforcement. If laws are not enforced, disorder will be conclusively presumed. Therefore failure to enforce laws is disorder in itself. The idea is essentially a religious one, and we are acclimated to a wide conflict between practice and utterance in the realm of such notions. Even those who regard the ideal as impracticable so far as their own conduct is concerned consider it good for the public in general.

The effect on general human conduct of such notions is slight indeed. But the effect on judicial institutions, their verbal technique, and their procedural structure is very important. It is difficult either to understand or to reform criminal law or procedure without taking the underlying assumption of law enforcement as an ideal into consideration, because it will color the interpretation of any attempted change.

When we attempt to describe a public attitude such as surrounds the ideal of Law Enforcement we encounter great difficulty in putting it into words, or in distinguishing it from other unexamined assumptions which at times support it and at other times are in conflict. The verbal structure of criminal law is of course, elaborate. Yet it is nothing more than an attempt to reconcile and make more definite the implications of the vague public ideals that surround the criminal courts. Among these ideals is the notion that the terminology is or should be a set of rules governing society, and at the same time a set of rules which prevent the state from doing too

much governing. This results in a set of attempted reconciliations of conflicting attitudes. Then we usher in the ideal of law enforcement which compels us at least to appear to "enforce" all these attempted reconciliations at once. This is not a situation either to be deplored or approved. It is simply an example of the way attitudes affect groups of people bound by a common tradition and trying to do approximately the same thing. The whole thing is customarily referred to in tones of necessary respect as "the fundamental principles of the Criminal Law." This reference points vaguely to both the contents of all the ponderous works on criminal law and the unexamined ideals and impulses on which they are based. It does not explain these collections of conflicting ideals, but it does dignify them and give them the atmosphere of everlasting permanence among rapidly changing times and institutions—which is another ideal of considerable importance in our administration of criminal law.

It is important to keep in mind that we are concerned with "Law Enforcement" as a sort of creed, and not with the very reasonable anticipation, which always accompanies any rule, that it will be carried out in some way or another. When by imperceptible gradations emphasis is changed from the purpose or merits of a rule itself to the notion that the very prestige of government depends on enforcement as a kind of ceremonial, to be observed even toward obnoxious legislation—when the enforcement becomes directed, not to preserve public safety or convenience, but to justify a moral attitude toward law regardless of public convenience, then the common sense idea with which we started has become the mystical ideal called Law Enforcement.

The first important thing to be noted about "Law Enforcement" is that while it always appears to be very closely related to the problem of public order and safety, actually it has very little to do with it. Its effect is rather on the public utterances of those interested in the criminal law and on the appearance of the judiciary to the public. In order to understand this we must recognize that there are two very distinct problems of Criminal Administration: (1) the keeping of order in the community, and (2) the dramatization of the moral notions of the community.

The first is primarily a police and prosecutor's problem, little concerned with and only incidentally affected by any governmental philosophy. General satisfaction with or acceptance of the economic system plus a good set of policemen is probably more important in preserving peace than any code of criminal law. Given reasonable approximation of such a condition, the problem of the police and prosecutor is the suppression of the occasional dangerous individual.

For this purpose the ideal that all laws should be enforced without a discretionary selection is impossible to carry out. It is like directing a general to attack the enemy on all fronts at once. It conveys no idea whatever as to the next appropriate action. The prosecutor therefore must look at the criminal law, not as something to be enforced because it governs society, but as an arsenal of weapons with which to incarcerate certain dangerous individuals who are bothering society. He will be confronted with a long line of offenders caught in the net who are unimportant, but who must be disposed of. His choice will be either to make reasonable compromises with them, or else to clog the machinery with relentless prosecution of comparatively harmless persons. There also will be dangerous and important criminals who are sentenced under some minor count because there is not sufficient evidence to convict them of the crime for which they are apprehended, and whose ignorance of the strength of the prosecutor's case makes them believe a guilty plea to a lesser offense is a wise compromise. Or they may be restrained under some entirely different law because it is more convenient, such as the income tax law, or vagrancy statutes. The fact that there are more laws than he can ever enforce is not a handicap, but an aid to the prosecutor because it gives him so many offensive weapons against any particular individual. Obsolete laws may be revived and used for purposes that their authors never dreamed of, to sink into obscurity again when the particular individual has been put behind the bars. The prosecutor wants to win cases, and to restrain individuals. The ideal of Law Enforcement, distrusting bargaining, demanding uniform sentences, and putting the emphasis on laws rather than on individuals, sinks into the background.

The second function of Criminal Law administration, to dramatize the moral notions of the public, is probably the most important function of the criminal courts, as distinguished from the prosecutor, because they work in the limelight of public observation. We may illustrate this by two cases, one in which Al Capone, against whom no sufficient evidence of bootlegging or racketeering had been found, was sentenced under a tax law;³ and another in which an admitted whiskey ring, against whom there were all sorts of evidence was freed by the Supreme Court of the United States.⁴ In the Capone case a compromise was at first reached on perfectly justifiable grounds, known to the Federal Judge and approved by the Attorney General of the United States. Subsequent advertisement of his good fortune by Capone himself made this compromise im-

3. *Capone v. United States*, 51 F. (2d) 609 (C. C. A. 7th, 1931).

4. *Go-Bart Importing Company v. United States*, 282 U. S. 344 (1930).

possible because it conflicted with the ideal of law enforcement. It became necessary and under the circumstances quite justifiable for the Federal Judge to repudiate the compromise and to announce from the bench that there could be no bargaining with the Federal Court. The expediency of this announcement from the point of view of the dramatic function of criminal courts is obvious in spite of the fact that statistical studies indicate that it would be quite impossible to conduct the criminal business of the Federal Court without something which can only be distinguished from bargaining by logical hairsplitting. Capone was then sentenced for violation of the income tax laws, but the penalty was obviously based on his supposed violations of other laws. The prestige of the state seemed somehow involved in his conviction. There was a general impression that an acquittal would cause respect for the law to suffer a very serious setback leading to all sorts of vaguely imagined calamities. The actual incarceration of Capone may have had some effect on the criminal situation in Chicago, but certainly very little elsewhere. Yet the case was considered of the utmost importance on the criminal problem all over the country; it was hailed as a triumph of Law Enforcement. People generally felt better because of the emotional significance of this vindication of "Law" against its enemies. It was as important as a spectacular victory in a war, in which some one who wore epaulettes and bore the title of general had been captured.

In the same way when the admitted whiskey ring was freed by the Supreme Court of the United States because of an invalid search, we were furnished with a symbol of the conflicting ideal that government should not enforce laws by unreasonable searches no matter what they find. A moment's reflection would indicate that the temper of the police commissioner is of much more significance on governmental interference with rights of respectable citizens than appellate court utterances. The testimony of any district attorney will bear out the assertion that persons who consciously rely upon these utterances are almost always criminals who deserve to be convicted. Third degree methods may flourish even in an atmosphere of appellate court condemnation. But the function of courts here is not directed toward the practical solution of the problem with which they can have little to do. They are engaging in a public ceremonial in celebration of an idéal. For this purpose, the more deserving the accused is of punishment, the more striking is the exemplification of the emotional lesson. Thus the prestige of the government in enforcing laws is vindicated in one case while a ceremonial in memory of individual freedom from law enforcement is celebrated in another. The task of keeping these two shows going at the same time without losing the patronage or support of the constitution for either is then left to

the legal scholar. The result is the development of substantive criminal law with conflicting details which are puzzling to persons who do not understand the unexamined popular assumptions which lie in the background.

This dramatic ideal of "Law Enforcement" as it has become part of the political consciousness of today shares the frailty of all ideals in that when reduced to logical statement instead of being expressed emotionally or poetically it disappears. The best statement which we can make of it would run about as follows. Laws (particularly criminal laws) are peculiarly sacred things. Whatever their merit intrinsically or by whatever political chicanery they may have been passed, they must be respected or enforced. Laws must be respected so that they may be enforced and enforced so that they may be respected. If any single law is not enforced it leads to disrespect for all laws which in turn leads to the non-enforcement of all laws. The original notion of respect for a "Law" which is above the King was invented as a justification for revolt against constituted authority acting in an arbitrary way. Today it becomes the emotional compulsion not to revolt against constitutional authority acting in an arbitrary way.

These circular notions, sometimes learnedly and at other times oratorically or poetically expressed, are constantly moulding our criminal administration and our ideas of its reform. In the struggle over prohibition they have compelled the wets as well as the dries to demand enforcement. So fixed is the notion in the popular mind that parents often hide commonplace liquor violations from their children because they are unable to formulate a philosophy which will justify their conduct even to themselves. They do not want to be a "malign influence" causing disrespect for government as Lord Coke was when he made his famous statement that there was a law above any constituted authority. A politician who today would publicly advocate the disregard of any law would be a dangerous radical, because such an open statement of a well known fact would disturb the structure of our government.

It is curious to note that as the ideal of Law Enforcement becomes more and more abstract and mystical it has less and less to do with actual enforcement. This is illustrated by the fact that it attaches itself to some laws and not to others in a way which seems almost accidental. Generally, the laws or the instances which cause the most violent emotions of law enforcement in the public mind are those of the least social significance. The creed is notably absent in so-called civil cases, and even from criminal penalties in the field usually designated as civil law. We do not find it attached to negligence, breaches of contract, public utility rate-making, corporate mergers, unfair competition, etc. Attorneys who arrange devices

by which their incorporated clients may avoid the implications of such laws are able to maintain positions of impregnable respectability. If they assisted in the operations of a bootlegging syndicate, their social positions would be much less secure. To a man from Mars, however, unaccustomed to our emotional atmosphere, it might seem that the prestige of the state might just as well be involved in public utility rate making provisions as in the occasional incarceration of a bootlegger. The important difference which he would fail to see is that the case of the bootlegger is much simpler, less important, and more easily understood by the man on the street, and therefore offers better material for drama in which conflicting ideals are alternately demonstrated.

It is also curious to note that the creed generally attaches to laws which are not only not enforced but which cannot be enforced. It has surrounded rules regarding chastity of priests in the middle ages, card playing by members of the Methodist Church, and prohibition violations in our own day, all of which appear to have been impossible ideals, with an importance and with a vast body of expository logic which the actual social effect of these rules would hardly seem to warrant. The creed has made relatively insignificant laws grow like snow balls, adding enforcement provisions to provisions which are to be enforced, penalties to penalties, speeches to appeals to civil consciousness at public mass meetings, oratory to scientific reasoning until other social problems are completely forgotten in the turmoil. Among criminal laws the public emotion which has been expended over prohibition enforcement has been ten times that involved in the more serious crime of murder. And even in murder cases the issue of "Law Enforcement" becomes acute only in such cases as that of Lieutenant Massie who killed the ravisher of his wife under circumstances which raise grave doubt about the justice of the law's penalty. To the maxim, "better ten guilty men escape than one innocent man be convicted" has been added "better ten unjust penalties rather than see one law unenforced." For, to conceive of "justice" other than in terms of "law enforcement" is to attack the authority of Law.

If the reader conceives that the foregoing is intended as an attack on the ideal of Law Enforcement coupled with the intention of removing it suddenly from the public consciousness, he has missed the purpose of the writer. The great paradox of government consists in the fact that institutions lose vitality without ideals, in spite of the fact that all ideals may be made to look absurd by unemotional and practical statements. Therefore the speech quoted above concerning law enforcement is not to be criticised merely because it is a poetic appeal to preconceived notions. Given its setting, and un-

derstanding that the official making it was engaged in the business of advocacy, and not in the enterprise of social dissection, such a speech performs a function in inducing the unreflective to accept governmental action which they do not like. To criticise it because it does not fit into a more objective approach is completely to confuse the function of poetry and oratory with the function of analysis. The idea is not that all the poets and orators should be killed off and skeptics substituted for whom preaching would be unnecessary. That would be even more difficult of realization than the ideal of Law Enforcement which we are discussing. The reformer who desires to make changes in other than a revolutionary manner should base his entire scheme of reform on a technique of public acceptance, which neither criticizes nor attempts to change general preconceptions, but rather uses them to accomplish the desired ends. Since emotional acceptance is the most important factor in successful government, the technique of the analyst should be directed not at criticizing this fact, but at making the work of the orator more effective by examining the prejudices which the orator must recognize and deal with objectively if he is not to add more confusion to the situation which he is trying to remedy.

With this caveat, we shall attempt to discuss some of the effects of the notion of "Law Enforcement" first on the theory, and second on the procedure of the administration of Criminal Justice.

One of the most interesting results of this attitude on political theory is the generally accepted and constantly recurring slogan that we have too many laws. Learned people are always counting the laws and claiming that their number is a menace because they cannot all be enforced. No policeman can learn all of them and therefore he cannot know what to "enforce"; no citizen can keep from unwittingly committing "crimes". There appear to be 13,672 sections in the Missouri code, 15,532 in Michigan, 15,367 in Ohio, and eight volumes in New York. (To make the argument more impressive "civil" and "criminal" statutes are usually lumped together.) Many speeches and numerous articles are formulated on this theme whenever the talk turns to the administration of criminal law. Yet one is not accustomed to hear complaints made about dictionaries because they contain so many words which are never used, thereby causing disrespect for words. The prestige of the church does not appear to suffer because there are so many texts in the Bible upon which sermons are never preached, or so many hymns in the hymn books which are never sung. Just as laws are passed with the expectation of their being enforced, so hymns are published with the expectation of their being sung, but the failure of this sacred institution to use all its available written material is not regarded as a

reason for restricting the choice of hymns to the number that probably can be sung within a given period of time.

Obviously these constantly reiterated warnings about the number of laws do no more than illustrate the conception of law enforcement and its general unanalyzed acceptance. They lead to practically no tangible results. It seems to be a permanent characteristic of criminal codes that they are palimpsests, with one thing written over another, with nothing ever repealed. The theory that this can be cured by education does not seem to have worked out because with the increase in legal training the process has only been accelerated. No way has yet been discovered of preventing moral attitudes from persisting long after they are in direct conflict with human behavior. Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals. However, so far as the effect of the number of criminal laws on policemen or the prosecutor is concerned, they are more apt to be a help than a hindrance. Such persons are trying to apprehend individuals who at the time happen to be considered dangerous to society, and the wider selection of laws which they have, the more chance there is of conviction. Of course this power in the prosecutor to dig up obsolete laws, or to use laws passed for one purpose (such as the income tax law) to accomplish an entirely different result may be viewed with alarm. However, it is the very creed of law enforcement which increases the number of laws. Given a law which is not enforced, we must pass other laws to enforce that law, and still others to make effective the laws to enforce the law. Hence the same attitude which causes fear because there are so many laws which are not enforced also causes the multiplication of enforcing laws. Take away that attitude, as has been done in the case of so-called "blue" laws, and they appear to die a natural death without bothering anyone, even though they are not repealed.

It may well be that we would be "better off" with less elaborate codes, but we are interested here only in pointing out the factors which cause elaboration. When codes are revised in the interests of simplicity and clarity it is usually done by lawyers. They bring to their task another ideal: that there is some use for all legal concepts, and that everything may always be reconciled with everything else—a wordy process for which the legal technique seems preeminently adapted. Hence codes appear to be increasing in size rather than diminishing, and general preaching that laws should be either enforced or repealed is not adapted to the purpose of simplification. It does not take into account a prediction of what will

probably happen when lawyers or legislatures actually attempt to revise.

A second interesting effect of the creed on legal thought is found in the various studies on the cost of crime. Though not particularly important in themselves, they illustrate the mysterious way in which the idea of Law Enforcement moulds our thinking. The net result of such studies is to show that this cost runs into billions of dollars. Let us examine (1) how this cost is arrived at, and (2) why we compute it.

The first element of the cost of crime is usually estimated by putting a pecuniary value on the time various salaried officials spend on it. Thus we discover that since prohibition offenses occupy the most time, if the prohibition law were repealed the *cost of crime* would be greatly reduced, even though people in general continued to do exactly the same as they are doing now. Under a more modern theory, the problem of crime is that of the socially unadjusted individual. Thus, we could by one stroke of the pen socially adjust thousands of persons by calling bootleggers by the term "liquor merchants." On the other hand we could double the cost of crime by attempting to enforce the birth control laws now on the statute books and thus socially unadjust thousands of individuals. We are confronted with a painful dilemma here. If we let the birth controllers alone we cause disrespect for all law. If we prosecute them we increase the cost of crime, (already much too high) and at the same time increase the number of socially unadjusted individuals. By this time we realize that we are not talking about the cost of "crime" at all but the cost of law enforcement. The concept of "crime" we leave unexplained. Certainly we do not mean to include "law violations" in this category because we do not worry about the cost of illegal birth control measured in terms of the productive capacity of individuals who might have been born. Nor do we mean to exclude those violations of law which are done by the respectable, because if we did we would exclude prohibition from our computations. What we are measuring is the cost of enforcing such laws as we actually enforce. The object is to prove that the way to cut down this cost is to prevent violations. The moral is that the best way of preventing violations and thus decreasing cost is to increase our expensive efforts at enforcement.

The second query is why such studies are made. We may illustrate this by examining a second usual element of cost accounting, the value of property destroyed by criminals. Suppose, for example, A feloniously burns \$1000.00 worth of cotton belonging to B, and it costs \$200.00 worth of the time of the judges and sheriffs to convict him. Obviously the cost of crime has gone up \$1200.00. If on

the other hand *A* is employed by the Federal Farm Board and induces farmers not to plant, or not to harvest \$1000.00 worth of cotton, the result in terms of available cotton is the same as in the first case. But here the absence of the cotton is a benefit (instead of a loss as in the first case) of sufficient value more than to pay the salaries of the Federal Farm Board who brought it about.

Why do we estimate cost in these terms in the case of the criminal, and not in the case of the farm board? The answer discloses a reason why these cost studies are made. We start out with the idea that we prove the evil of violating the law. First we call it a malign influence sapping the foundation of government. Then we correlate it with another disagreeable idea, cost, because we want taxpayers to shudder as well as moralists. In the Farm Board illustration we are in a field where the law enforcement ideal does not appear.

The only importance of this discussion is to show the queer tricks that the concept of law enforcement is playing on our thinking. The computation of social costs is probably the most elaborate and scientific method of cursing the law violator ever devised. It is the ultimate in scholarly profanity. Its function is as a weapon of attack. Its test is not truth, but emotional effectiveness. It is also found in attacks against such evils as war or bankruptcy in order to support entirely different creeds.⁵ Social costs are only a method of emphasizing social values, not an analysis of them or a proof of their desirability.

It now becomes necessary to point out that merely to call studies on the cost of crime a form of preaching, does not condemn such studies. As preaching the standard can only be effectiveness in emotional appeal to the taxpayer. We also recognize the fact that some of these studies contain statistical data of great value to any objective observer of government. We take for example the Wickersham Commission report.⁶ Its tables on the "Cost of Crime" furnish

5. For another typical example of the use of "social cost" see Editorial, N. Y. Times, Friday Oct. 7, 1932: "THE TAXPAYER'S BILL. The American Bankers Association was told at its convention that the cost of government in the United States has reached a point where it equals a fair net return on the value of all the property in the country. This statement was made by MR. PAUL SHOUP, vice-chairman of the Southern Pacific Company. He estimated the present total wealth of the American people at \$350,000,000,000, and pointed out that if this sum were invested in savings bank accounts it would yield a return of between \$13,000,000,000 and \$14,000,000,000. The cost of government in 1929 was approximately \$13,050,000,000. There is good reason to believe that it is well above \$14,000,000,000 in 1932." The abstraction "bureaucracy" is often proved by actual figures to be very expensive. See JAMES M. BECK, *OUR WONDERLAND OF BUREAUCRACY* (1932).

6. National Committee on Law Observance and Enforcement. Report No. 12, Cost of Crime.

material for examination of such things as the relative expenditures of courts in various states, the amount of time Federal Judges spend on various types of business, etc. Because this data does not "prove" anything does not mean that it may not be put to all sorts of uses. For the existence of this data we have to thank the law enforcement creed. Without it a commission on "Law Observance and Enforcement" would never have had the opportunity to spend the necessary funds. But the same creed makes critics center their attention on the "conclusion" of the report as to Law Enforcement, cost, etc., while they ignore its statistical and observational studies. The observational studies are then attacked because they lead different persons to reach different conclusions. To refuse to collect the data because it will never fulfill its avowed purpose of giving the "cost of crime" is to fail to recognize that much scientific work must be done under the cloak of preaching. We may illustrate this by another medical analogy. The first process of medicine always consisted in incantations over bubbling pots. As the physicians developed in skill and experience they watched the effect of certain ingredients on the patient while repeating their accustomed formulae, and thus discoveries in technique developed. The impossibility of visiting the patient in order to develop these techniques without conforming to his preconceived ideals of medicine is sufficiently obvious except to the "sincere" revolutionist.

A third important effect of the creed of Law Enforcement on legal theory is found in the contradictions in which it is continually involving the judicial system. These are reflected constantly in the complicated distinctions and reconciliations of the Criminal Law with the "law in action" which proceed under that elaborately embroidered verbal cloak. It is impossible to understand the "principles" of the Criminal Law without analyzing these contradictions. A few of them may be stated as follows: (1) *Assumption*. The courts enforce the Criminal Law, and therefore the verbal content of criminal law and procedure is of the utmost importance to public order and safety. *Contradiction*. Courts play only a minor part in the problem of public order, judged from the small percentage of cases which reach them and, therefore, the actual form of the statement of its "principles" (as opposed to definite statutory prohibitions) is unimportant. (2) *Assumption*. Criminal Law is a body of governing rules, protecting certain social interests which are generally known and guide the ordinary citizen in his conduct. *Contradiction*. Substantive criminal law for the most part consists, not in a set of rules to be enforced, but in an arsenal of weapons to be used against such persons as the police or prosecutor may deem to be a menace to public safety. The choice of weapons is sufficiently

elastic that the prosecutor may select a large number of offenses with different penalties to cover any single course of conduct. (3) *Assumption*. It is the duty of the prosecuting attorney to enforce all criminal laws regardless of his own judgment of public convenience or safety. Compromises and "bargain days" in criminal courts lead to disrespect for law because this process conflicts with enforcement of law. *Contradiction*. It is the duty of the prosecuting attorney to solve the problem of public order and safety using the criminal code as an instrument rather than as a set of commands. This makes it proper and necessary that some laws should be enforced, others occasionally enforced, and others ignored according to the best judgment of the enforcing agency. The criminal problem must be looked at as a war on dangerous individuals and not as a law enforcement problem, unless we want to escape from reality by taking refuge in an ideal world of false assumptions concerning both criminal codes and criminals. (4) *Assumption*. The bargaining process by which guilty pleas are induced in exchange for smaller sentences is one to be condemned as contrary to our ideals of criminal justice. *Contradiction*. Criminal cases should be frankly compromised in the discretion of the prosecution. Any other method would require a complete reorganization of our judicial system because of the increased number of trials. The method of compromise assists in the solution of the problem of public order by permitting the speedy disposition of minor offenders and the punishment of important criminals against whom evidence is lacking. (5) *Assumption*. The problem of the punishment of minor offenders is the most important with which criminal courts deal. Therefore we must have more dignified, more skilled and better paid judges for minor offenses. *Contradiction*. The fact that Federal Courts are compelled to try so many minor offenders detracts from their dignity and distracts their attention from more important matters. Therefore, there should be created something in the nature of a Federal Police Court with less dignified and lower paid magistrates.

The chief difficulty which arises from these ideological contradictions is that reforms are undertaken without realization of their existence. This leads to proposals for change without examination of the standards by which we are judging the judicial institution. Thus, we find attempts to raise both the salaries and dignity of police court judges and also attempts to take away police court business from high salaried and dignified courts. We find some who condemn grand juries because this system requires too many persons who interest themselves unnecessarily in the criminal process, while at the same time expenditure of more money is advocated to interest a larger number of citizens in the problems of the criminal court.

One of the most frequently applied standards is based on the unexamined assumption that courts are business institutions which are engaged in some sort of production (presumably the production of justice measured in statistical terms by the production of convictions). A comparison with the U. S. Steel Corporation is invoked. Speed and efficiency are the tests resorted to. Cases of rare occurrence even though spectacular are assumed to be of minor importance because they do not stand out in the mass statistics which grow out of all efficiency studies. We thus lose sight of the dramatic functions of the court because of the idea that courts are business institutions which should enforce law in a "business-like" way.

The results of the ideal of law enforcement on legal and political thought are probably less important as a practical matter than its results on the procedure of prosecutors, officers and judges. Some of the problems thus created may be shortly described.

(1) It compels the necessary compromises of criminal cases to be carried on *sub rosa* while the process is openly condemned. Probably the difficulty with our compromise system and the technique of obtaining guilty pleas today lies in the necessity of explaining it away and in the fact that concealed practices have a bad odor. In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute (even though it is actually only a quarrel between individuals) finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or as at best a necessary evil. The "State" can never compromise. It must "enforce the law." Therefore open methods of compromise are impossible.

The same notion is a factor in preventing adoption of the very sensible Continental practice of combining civil and criminal penalties in one suit. This could not be done without bringing out in the open the possibilities of compromise of criminal cases by securing civil reparation. So long as civil cases are accompanied by one ideal and criminal cases by another, we will find great difficulty in combining them, no matter how sensible the result.

(2) The doctrine of mitigating circumstances pleaded at the trial of a criminal case also falls afoul of our law enforcement creed, because the recognition of such circumstances means that some violations of the same law are to be treated differently from others. Therefore, while the state in its sentencing or in its pardoning function may take these things into consideration, they are certainly matters which jurors or anyone concerned with the stern impartial process of "trying" the accused must not know. Thus our process attempts to outlaw the "unwritten law". But since the unwritten law can

never be ignored at any stage in the proceedings we find it creeping into the trial in devious and highly diverting ways. The only effect on the contested trial of that enormous body of literature devoted to *mens rea* and criminal insanity is that it permits mitigating circumstances to creep into the evidence dressed up as facts to which scientific and impartial testimony may bear witness. The search for definitions of *mens rea* since the *McNaughton* case, while it may express public morality, is pathetic in its failure to solve the trial problem of keeping emotion out while letting science in. And now comes the latest and most entertaining development of all, the parade of psychiatrists and alienists before the bewildered jury. Since they are "scientists" every believing person expects them to agree, if not now, at least some time in the future when the court or some impartial body selects them. No practical person expects anything of the kind. In practically all cases where the issue is contested they serve only one function, which is to permit evidence of mitigating circumstances to be brought before the jury. Read the records of the Remus case and the Massie case, and you will find that the attorneys knew exactly what they were about. The problem disguises itself as a problem of the treatment of insane persons. The actual cases where expert testimony is introduced are cases of persons whom the man on the street would call sane. Most cases of insanity are, in general, dealt with by prosecutors before trial and statistics are not necessary to prove the assertion that the prosecuting attorney does not ponder over the argumentative technique of *mens rea* in order to make up his mind whether to prosecute or to turn an offender over to the insane hospitals. The confusion is created not by faulty definitions of criminal responsibility, but by the conflict of the ideal of law enforcement with the ideal of mitigating circumstances. When this problem is solved in some other way, and not before, the conflicting psychiatrists will disappear from our criminal trial.

(3) The ideal of Law Enforcement conflicts with the older concept of individual freedom from governmental interference which is not less tenaciously held, and which has become increasingly pressing as "Law Enforcement" has been preached. Before prohibitionists sought to distract attention from the merits of the prohibition law to Law Enforcement as involving the integrity of government, the problem of search and seizures was a minor one. Thereafter, searches and seizures became the weapon of attack which could be used against prohibition enforcement. For every dry speech on the dangers of disobedience, there was a wet oration on the dangers of invading the privacy of the home. Reflected in the courts the figures are startling. In six states selected for the purpose of study we find

nineteen search and seizure cases appealed in the 12 years preceding prohibition and three hundred and forty-seven in the 12 years following.⁷ Cases in appellate courts are reflected in trial courts in geometrical proportion. The various fine distinctions which are created by this number of cases show the scholarly technique at its wordy task of reconciling these contradictory ideas—one of which was cropping up for the sole purpose of opposing the other. The result is confusion both in the expression and in the practice concerning searches and seizures the absurdity of which is apparent to the layman. To him, neither do the constitutional guarantees appear to be protected, nor do the laws appear to be enforced. The effect of this confusion on the problem of crime is probably negligible, but the effect on the prestige of the courts is unfortunate.

Because the creed of law enforcement has a habit of arising out of laws which are impossible of being enforced, it seems to be more of an influence in this country today than in any other. England seems to have escaped it through a tradition of private prosecution.⁸ There the prosecutor may take the position that it is a matter within his discretion as to what laws he will enforce and what laws he will leave to enforcement at the expense of private individuals who are complainants. This furnishes a logical escape from the demand of any small minority that their preferences for any given legislation be turned into governmental action which is not open to a prosecutor in this country. Possibly this may be one of the reasons why we can notice a different attitude in public utterance in England. Certainly no modern American politician could advocate disregard of any law and remain in respectable company. Yet in England, Bonar Law advocated resistance and disregard of law for Ireland in 1912 and later became prime minister. Ramsay MacDonald during the progress of the war preached resistance in England and is now at the head of the English government. In this country we have to go back to the time when Thomas Jefferson approved of the disrespect for law manifested in the whisky rebellion to find a similar situation.

7. These figures are taken from an unpublished graduate thesis on Search and Seizure by J. D. Jennings. STUDENT ESSAYS 1931-1932, Yale University Law Library.

8. See PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND (1931) 93: "An American efficiency expert would doubtless be appalled at the lack of uniform method of conducting prosecutions and would immediately set out to tinker with existing arrangements. The Englishman does nothing of the sort because, despite an occasional scandal, the system seems somehow to work and he is not greatly interested in learning how it works or why it works. At all events he grows melancholy at the thought of changing it. The pragmatic test is for him sufficient."

In the United States it appears to have been the prohibition law which has sharpened our consciousness of the moral beauty of law enforcement as an end in itself. Whatever one thought about prohibition the tradition has grown up that no right thinking person can deny the validity of Law Enforcement. This concept, which has run through all prohibition discussion since this law was passed, was referred back to another great law enforcement utterance: Andrew Jackson's sermon on nullification. President Jackson, wisely enough, chose not to talk on the highly debatable question of secession. It was more effective for him to take his stand upon the unquestioned assumption that "nullification" was an evil in and of itself. The phrase had magic in it. It was burned into our consciousness by the civil war. When the prohibition issue became acute it had to be fitted out with a decent ancestry and with arguments which would avoid the necessity of talking about the merits of prohibition. The usual shibboleths, the spirit of '76, the embattled farmers at Bunker Hill, the speeches of Patrick Henry, and the ideas of the constitutional fathers were inconsistent with prohibition. However, the sermon on nullification not only had a deep sentimental association, but it struck the right logical note. Its implications made it a useful analogy to support the position that unless all laws are impartially enforced the governmental structure will totter.

The future of the ideal is difficult to predict. Psychiatrists and psychologists are filtering into the administration of Criminal Law with astonishing rapidity. They bring with them an absolutely contrary assumption—that the problem of crime does not concern law enforcement but instead the maladjusted individual. Here may lie the seeds of destruction of law enforcement as a creed. Yet it is interesting to note how the point of view of the psychiatrist usually changes when he approaches the criminal trial.⁹ Accepting the idea that the Court is enforcing "law" he takes his role as a witness to the "facts" of mental responsibility to which the "law" of criminal responsibility is to be applied. The older legal definitions of insanity make it difficult for him to use his accustomed terminology. He therefore concerns himself with framing new definitions of "responsibility" which will permit him to use his pet terms in testifying as a witness on the facts. Then the psychiatrists like the lawyers support their new definition with the creed of an impersonal law which must be enforced by applying it impartially to the "facts." Thus it escapes their attention that a definition of insanity is, in

9. This attitude is of course not universal among psychiatrists. For example, William A. White of St. Elizabeth's Hospital in Washington, testifying in the Leopold-Loeb case referred to criminal responsibility as "a legal fiction".

so far as it affects a trial (1) a ritual by which juries are put in the proper frame of mind to decide a particular case, and (2) a method of Appellate Court control of juries and trial courts. It generally is formulated only in an instruction at the end of a long case. Judged from this point of view the formula should be tested only by its effectiveness in fitting in with the preconceived ideas of jurors—not as an absolute standard to be enforced. However, the search for a new psychiatric definition of insanity indicates that at present at least the ideal of law enforcement is not disappearing with the infiltration of scientists into the criminal trial.

Such ideals as law enforcement are the unescapable attributes of legal institutions and essential parts of their anatomy. Without ideals the institution loses its personality and appears to the public as a mere group of people doing various little things in a very imperfect way. It does not matter to the security of the institution that the ideals are not “true.” It is only important that they fit into the vague emotional notions of that part of the public whose acceptance is vital to the power of the institution, and without which it falls.

A query may arise as to the purpose of such a dissection of legal ideals in operation. The answer is that only in this way may we unite the study of law in action with law in books—or, in the field of government, politics and theory. This distinction does not exist anywhere except in the world of scholarship. Its existence is the reason why legal and governmental scholars are called impractical theorists, a term which is never applied to their colleagues in the school of medicine since the study of anatomy has united medicine in action and medicine in books. Unquestionably the distinction is of use for the purpose of making possible the formulation of the creeds and restatements of law which are part of the very structure of courts. To this extent it is indispensable. But the distinction is a handicap in the study of these very principles once they are formulated. It prevents us from understanding where the principles came from and why they have become so complicated. It leads us to regard Jurisprudence not as a symptom but as an explanation, to center our attention on what theorists say, instead of on why they talk the way they do. And finally it prevents the scholar from becoming a useful politician in the same way that Galen's anatomy prevented the ancient physician from becoming a healer.

Detached scientific observation can never tell us whether an ideal or a reform is “good” or “bad”; it cannot furnish us with standards of value. It is indispensable, however, in informing us what ideas other people cling to as social values, and the kind of phrases to which

they respond. It tells us what to expect of these values and these phrases in action. From such a method we may not learn what are the most "socially useful" reforms, but we may be able to predict the results of any given attempt at reform—or the verbal expression of any reform which gives it the best chance of public acceptance. It may dissuade us from solving problems by blaming undetermined masses of imaginary people such as "the bar," "the politicians," "the radicals," or "the hidebound conservatives." It may prevent us from futile condemnation of "human stupidity," and from constant disappointment with the ordinary man because he is so ordinary. The key to the superior effectiveness of the politician or the practical lawyer lies in his acceptance of groups of people as he finds them and his ability to study what moves them about, without moral discomfort because they are not moved by "better" things. This key lies at the hand of the legal scholar if he will accept it, and he can add to the technique of the practical lawyer a freedom from mercenary motive or loyalty to particular clients.

Therefore the science of government, in which we include courts of justice, is vitally concerned with what we may call the technique of public acceptance. Granted that the governmental or legal scholar must formulate a scheme of values (which he usually gets out of the cultural scheme of his group and seldom analyzes) his most important study is the manner in which such values may be translated into human organization. To understand this he must know the circulation of ideas in the social system, and the function of these ideas in giving continued public acceptance to institutions whose membership is constantly changing sometimes for the better and sometimes for the worse. The first step in understanding is to examine these ideals objectively to see the actual part they are playing, to note their contradictions, to realize that it is customary for absolutely contrary ideals to exist side by side, to know that these ideals may have little to do with conduct and yet much to do with acceptance and power. Only if we recognize that the chief function of the criminal court is not to enforce law but to dramatize law enforcement do we have a sensible basis for understanding or reform.